Supreme Court, U.S.
FILED

No. 10- 10-739 NOV 30 2010

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IN THE

Supreme Court of the United States

ALEX ABOU-HUSSEIN,

Petitioner,

v.

ROBERT GATES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a federal officer is entitled to sovereign immunity from a suit that does not seek any monetary relief.

II. Whether the trial court erred in agreeing with defendants' sovereign immunity defense when the relief requested is declaratory pursuant to the Declaratory Judgment Act.

III. Whether the plaintiff's due process rights were violated by defendants' assignment of him to a military mental health facility while suit was in the trial court.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as set forth in the caption of the case.

Petitioner
Alex Abou-Hussein, is a naturalized US Citizen.

Respondents
Robert Gates, Secretary for the U.S. Department of Defense, U.S. Department of Defense, and Space and Naval Warfare Systems Command.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alex Abou-Hussein ("Hussein") respectfully requests the court to grant his petition for a writ of certiorari, and review the judgment of the United States Court of Appeals for the District of Columbia, entered June 11, 2010.

Alternatively, Hussein requests a remand because of respondents' violation of petitioner's due process rights that denied him access to court, pursuant to Fed. R. Civ. P. Rule 60(b)(3), *Klapprott v. U.S.*, 335 U.S. 601 (1949).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia, which is not published, 2010 WL 2574084 (C. A. D. C.) is attached hereto at (Pet. App. 1a-3a). The District court's Findings and Conclusions, which is published, 657 F.Supp.2d 77, 80 (D. D. C. 2009), is attached hereto at (Pet. App. 4a-12a).

JURISDICTION

A timely petition for rehearing to the court of appeals, filed on September 1, 2010, was denied. (Pet. App. C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a case about drawing the boundaries of United States' general waiver of sovereign immunity from suits not seeking monetary damages pursuant to 5 U.S.C. § 702, Administrative Procedures Act (APA). It challenges the D.C. Circuit's agreement to an "automatic" immunity defense raised by high-ranking government defendants when a plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201, an order to expunge his national security records, and does not seek any monetary relief.

In 2005, the Arab-American petitioner ("Hussein"), a federal employee, filed EEOC complaint against a government security official, who in turn alleged -a month later- that Hussein is a sleeper agent spying on military electronic jammers designed to counter Improvised Explosive Devices (IED). The alleged espionage on roadside bombs' defenses was investigated, but criminal charges were not filed. In 2007, Hussein executed EEOC release under duress of new allegations of his espionage for Russia, and respondent admitted to a security "error".

In May 2008, Hussein, started this action in district court, and prayed for a declaration that defendants had maliciously made false statements, the release of his national security records, and an order to expunge his records from the espionage allegations. District Court granted US Attorney's motion to seal the exhibits.

Defendants moved to dismiss—with prejudice—the civil rights claims under Rule 12(b)(1)&(6), neither denying nor admitting the facts alleged in the complaint,

and invoked their Sovereign Immunity. Defendants supported their motion with FOIA affidavits that only discussed Hussein's multiple PA/FOIA requests for his records. Hussein then moved to amend his pleading, and submitted a more definite statement (R.38) to bolster his amended complaint.

In August 2009, while the lawsuit was still pending, a respondent's Anti-Terrorism official cited Hussein for "mental disorder, sleeping with a firearm, and substance abuse", and had Hussein undergo Psychological tests, including at respondent's military mental health facility.

In September 2009, while Hussein was scheduled for Psychological examination at the US Navy's Hospital in Charleston, SC, the district court for the District of Columbia dismissed the civil rights claims with prejudice, still without any denial or admission from the defendants to the facts alleged in plaintiff's statement (R.38). Hussein timely moved to stay the dismissal order, and argued that the defendants' sending him to a military mental health facility violated his due process rights and is a denial of access to court. Hussein's Rule 60 motion was denied by Honorable Richard Lyon, and a timely appeal was taken.

On June 11, 2010, the appeals court affirmed the dismissal of Hussein's suit with a form opinion that failed to address that Hussein did not seek monetary damages, but only an order to expunge his records, and a declaration that defendants made false statements pursuant to 5 U.S.C. § 702, Administrative Procedures Act (APA).

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Holding that Defendants are Entitled to Sovereign Immunity, when Plaintiff *only* sought a Declaratory Judgment, Is Incorrect.

Plaintiff's prayer for relief did not seek any monetary damages, but sought only a declaration that defendants maliciously made false statements, under the Administrative Procedures Act (APA) and United States' general waiver of sovereign immunity against suit, 5 U.S.C. § 702, as this court had established in *Bowen v. Massachusetts*.

Both district and circuit courts repeated defendants' branding of this action as "*futile*" because of "sovereign immunity". This is an error. In *Al-Kidd v. Ashcroft*, 580 F.3d 949, C.A.9 (2009), the 9th Circuit held that immunity is *not* an automated defense available to a government defendant, and stated: *[as] we have recognized in the past, interlocutory review of a Rule 12(b)(6) motion to dismiss puts our court in the difficult position of deciding "far-reaching constitutional questions on a nonexistent factual record." Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004).

This court had already visited the "automatic" sovereign immunity defense with its decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct.(1993), where it rebuffed the 5th Circuit requiring a plaintiff to "*state with factual detail and particularity why the defendant cannot successfully maintain the defense of immunity.*" *Leatherman* 507 U.S. at 167.

Hussein sought to have his records expunged, which defendants refuse to do. Hussein also sought a declaration that respondents defamed him; this court had already construed the APA waiver strictly for "*other than monetary damages*", 5 U.S.C. § 702, see *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722 (1988). The *Bowen* court explained that 5 U.S.C. § 704 provides for district court review of final agency action "*for which there is no other adequate remedy in any court.*"

A cause of action was codified in both statute and case law, 28 U.S.C. § 2201, "*Federal Declaratory Judgment Act validly conferred jurisdiction on federal courts to issue declaratory judgments in appropriate cases*", *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461 (1937). Defendants may argue they are immune from monetary damages, but they are not entitled to immunity from suit. "*Congress amended § 702 in 1976 to waive any immunity when no relief for monetary damages were made*", see *Schnapper v. Foley*, 667 F. 2d 107-08 (D.C. Cir. 1981).

II. The Trial Court Should Have Allowed pro se Plaintiff to Amend Pleading and Establish a Factual Record, and Failed to Draw All Reasonable Inferences in Favor of a Plaintiff who Bolstered Claims with a Definite Statement and Affidavit (R.38).

The district court erred in failing to give notice of the court's intention to dismiss his suit, and in denying his motion to amend his complaint; see *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1185 (7th Cir. 1989). "*If the dismissal of a pro se complaint was warranted,*

it should have been without prejudice in order to afford him the opportunity to file an amended complaint"; see *Moawad v. Childs*, 673 F.2d 850, 851 (5th Cir.1982), *Good v. Allain*, 823 F.2d 64, 67 (5th Cir.1987).

To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint "*sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'* " *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The trial court failed to review Hussein's more definite statement (R.38) that sufficiently averred the facts and explained that he executed a release under duress; however, both trial and appeals courts erred for not accepting his signed more definite statement on the record. "*On ruling on a motion to dismiss, a judge must accept as true all factual allegations of complaint*", *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n.1, 122 S.Ct. 992 (2002).

Dismissing Hussein's suit because action is allegedly "*futile*" was an error of law. The 9th circuit in *Al-Kidd* recognized that the requirement of plausibility "*does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise reasonable expectation that discovery will reveal evidence.*" *Id* at 976.

III. Respondents Violated Petitioner's Due Process Rights in a Denial of Access to Court When They Assigned Him to a Military Mental Health Facility While His Case Was at District Court.

In *Christopher v. Harbury*, 536 U.S. 403 (2002), this court opined: "*Access to the courts is clearly a constitutional right, grounded in the first Amendment, the Article IV privileges and immunities clause, the fifth Amendment, and/or fourteenth Amendment.*" *Christopher*, 536 U.S. 403, 415 n.12.

Plaintiff, pro se, was sent to a mental health facility - by a defendant- while the case was still in district court, and underwent multiple Psychiatric evaluations to prevent possible incarceration if framed to be a mentally-disturbed terrorist sympathizer.

"*To pass constitutional muster, access to the courts must be more than merely formal; it must also be adequate, effective, and meaningful*", see *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491.

Because Hussein was undergoing Psychological tests that spanned weeks before and after his suit's dismissal, he was not able to move under Rule 59. After the exoneration from being a mentally-disturber security threat, Hussein filed a Rule 60 motion in district court detailing the harassment. In circuit court, Hussein attached the US Navy's mental clinic report to his motion to appoint counsel, and reiterated how he was denied due process because of the defendants' actions.

In *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384 (1949), a German-American who was released from detention after WWII, filed Rule 60(b)(3) motion arguing his denial of access to court while being denaturalized, and this court reversed the district court order. "*Defendants need not literally bar the courthouse door*", see *Bell v. City of Milwaukee*, 746 F. 2d 1205 (1984). In instant case, the respondents' hampering of the civilian petitioner with a protracted process in mental health facilities violated his due process rights, and constitutes a denial of access to court.

Former Justice Brandeis wrote in *Olmstead*: "*The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.*"

CONCLUSION

The Petition for a Writ of Certiorari should be granted, or alternatively, certiorari should be granted, the District of Columbia Circuit opinion should be vacated and the case remanded.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JUNE 11, 2010

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 09-5358

HAMDY ALEX ABOU-HUSSEIN,

Appellant

v.

Robert M. Gates, Secretary of Defense, et al.,

Appellees

ORDER

BEFORE: Rogers, Garland, and Brown, Circuit Judges

Upon consideration of the motion for appointment of counsel; the motion for summary affirmance, the opposition thereto, and the reply; the motion for summary reversal, the motion for leave to file an opposition thereto, and the lodged opposition; and the motion for leave to unseal all exhibits, the opposition thereto, and the reply, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants

appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for leave to file an opposition to the motion for summary reversal be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion for summary reversal be denied and the motion for summary affirmance granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). As to appellant's civil rights claim, 42 U.S.C. § 1983 applies only to those acting under color of state law. *See* 42 U.S.C. § 1983. And, as the district court correctly determined, 18 U.S.C. §§ 241 and 1001 are criminal statutes that do not expressly create a private right of action. *See Cort v. Ash*, 422 U.S. 66, 79-80 (1975). The district court correctly dismissed appellant's libel claim on the ground the waiver of sovereign immunity contained in the Federal Tort Claims Case Act does not apply to libel claims. *See* 28 U.S.C. § 2680(h). The denial of appellant's second motion for leave to amend his complaint was not an abuse of discretion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The proposed amendment would have been futile, because the Federal Tort Claims Act "bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993); *see also* U.S.C.

§ 2675(a). Appellant's remaining arguments are similarly unavailing. Finally, appellant has said nothing to undercut the district court's rulings with respect to any claims he might have presented under the Freedom of Information Act and/or the Privacy Act. It is

FURTHER ORDERED that the motion to unseal exhibits be referred to the district court. *See* D.C. Cir. Rule 47.1(c). The district court is directed to analyze the motion under the factors set forth in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), and to articulate the reasons for its decision whether the documents should be maintained under seal. See *EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1410 (D.C. Cir. 1996); *Johnson v. Greater Southeast Community Hospital Corporation*, 951 F.2d 1268, 1277 (D.C. Cir. 1991). Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

PER CURIAM

APPENDIX B — MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 25, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 08-783 (RJL)

HAMDY ALEX ABOU-HUSSEIN, *pro se*,

Plaintiff,

v.

ROBERT GATES, Secretary of Defense, *et al.*,

Defendants.

MEMORANDUM OPINION

Pro se plaintiff, Hamdy Alex Abou-Hussein ("plaintiff"), brings an assortment of claims against Secretary of Defense Robert Gates, the Department of Defense, and the Space and Naval Warfare Systems Center ("SPAWAR") (collectively, "defendants"). Although difficult to distill, plaintiff's complaint appears to allege violations of his civil rights under 42 U.S.C. § 1983, libel, fraud or false statements under 18 U.S.C. § 1001, conspiracy under 18 U.S.C. § 241, and violations of the Freedom of Information Act ("FOIA"). Defendants have moved for dismissal as to some claims and for summary judgment as to others. For the following reasons, the Court GRANTS defendants' motion.

Appendix B

BACKGROUND

Plaintiff's claims arise from allegations that certain SPAWAR officials are engaged in a concerted effort to "frame" him for espionage. (Amended Complaint [#8] at 2-3, 7-8). Due to the actions of those officials in carrying out the alleged plot, plaintiff, in effect, accuses defendants of civil rights violations, libel, fraud or false statements, and criminal conspiracy. (*Id.* at 1-2, 4). In addition to these claims, plaintiff alleges that defendants did not comply with his various requests for information under FOIA. Plaintiff further claims that he submitted requests for his personal records to Naval Criminal Investigative Services ("NCIS") and to the Army Intelligence and Security Command ("INSCOM") but that both NCIS and INSCOM did not adequately respond. (*Id.* at 2). Specifically, plaintiff's NCIS request sought "all material regarding NCIS investigation [sic], including final report, which was conducted on [plaintiff], upon the request of Space and Naval Warfare Systems Center in Charleston, SC." (Declaration of LCDR Christopher D. Connor [# 19-2] at ¶5). His INSCOM request sought "all material regarding Army investigation [sic], including final report if any, which was conducted on [plaintiff], upon the request of Titan Corp., Fairfax, VA, as part of linguist qualifications to work with the army in Iraq." (Declaration of Susan J. Butterfield [# 19-4] at ¶4). In the complaint, however, plaintiff does not request these documents as relief; instead, he requests the following:

Appendix B

(I) Copies of all National Security Letters (NSLs) relevant to Plaintiff that were issued by any government agency to any DoD organization, and all NSLs which were issued by a DoD Organization, gag orders notwithstanding, *Doe v. Gonzalez* (2006).

(II) Copies of all records of all communications . . . which mentioned the Plaintiff in any form, that occurred between the Navy command known as SPAWAR Charleston and all other governmental, intelligence and security entities, whether SPAWAR was sending or receiving. This would include but not limited to, all records from the Command Officer, special security officer, and the legal office.

(III) Copies of all records of all communications . . . which mentioned the Plaintiff in any form, that occurred between any DoD organization and all other international, governmental, intelligence and security entities, including Egypt, whether DoD was sending or receiving . . . .

Amended Complaint [#8] at 16-17.

STANDARD OF REVIEW

Pro se pleadings are to be "liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (197 6). "[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks omitted). Where evidence outside of the pleadings is considered, summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In FOIA cases, an agency is entitled to summary judgment if it can demonstrate "that each document that falls within the class requested either has been produced or is wholly exempt from the Act's inspection requirements." *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001).

ANALYSIS

A. Miscellaneous Claims

Plaintiff's allegations of civil rights violations, libel, fraud or false statements, and criminal conspiracy are easily dismissed because each, for the following reasons, is barred as a matter of law. First, as to his civil rights claim, to the extent that he has sued the Secretary of Defense in his official capacity, the Department of Defense, and SPAWAR, that claim must fail because the defendants are immune from suit. Indeed, it is established that "the federal government has not rendered itself liable for constitutional tort claims." *Bostic v. U.S. Capitol Police*, _ F. Supp. 2d _, 2009 WL 2394408, *3 (D.D.C. 2009).[1] Similarly, plaintiff's libel claim must also fail because Congress specifically excluded

1. Plaintiff references throughout his complaint a previous employment discrimination claim that he filed against SPAWAR. (Amended Complaint [#8] at ¶¶ 17, 20, 22, 47-49, 58,

libel from its general waiver of sovereign immunity for torts. *See* 28 U.S.C. § 2680(h) (stating that the Federal Tort Claims Act shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, *libel*, slander, misrepresentation, deceit, or interference with contract rights" (emphasis added)); *Sottile v. United States*, 608 F. Supp. 1040, 1042 (D.D.C. 1985) ("The United States still retains its sovereign immunity with respect to

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(Cont'd)

63-73). The claim was ultimately settled. (*Id.* at ¶73). To the extent that plaintiff's complaint can be construed as alleging a civil rights claim based on employment discrimination, the Court agrees with defendants that such a claim is foreclosed by the prior settlement agreement between plaintiff and SPAWAR insofar as the claim is based on the same underlying facts as the settlement. *See Johnson v. Veneman*, 569 F. Supp. 2d 148, 154 (D.D.C. 2008) ("A settlement agreement concerning Title VII claims is sufficient to bar subsequent litigation of those claims."). Even if plaintiff is alleging a breach of the settlement agreement, his claim is still barred for failure to exhaust administrative remedies. *See Herron v. Veneman*, 305 F. Supp. 2d 64, 71 (D.D.C. 2004) (stating that a plaintiff's failure to notify, in writing, the EEO Director of alleged noncompliance with a settlement agreement "will deprive a federal court of subject matter jurisdiction over any claims involving" the settlement agreement). Similarly, to the extent that plaintiff is alleging employment discrimination based on facts that arose after the settlement agreement, this claim is barred as well for failure to exhaust. *See Beckham v. Nat'l R.R. Passenger Corp.*, _ F. Supp. 2d _, 2009 WL 2152255, *3 (D.D.C. 2009) ("The statutory scheme of Title VII requires a plaintiff to exhaust his or her administrative remedies before a civil action may be filed in federal court." (internal quotation marks omitted)).

defamation ....").[2] Moreover, plaintiff's claims of fraud or false statements under 18 U.S.C. § 1001 and conspiracy under 18 U.S.C. § 241 are also barred because these criminal statutes do not expressly create a private right of action upon which plaintiff may sue defendants. *See Prunte v. Universal Music Group*, 484 F. Supp. 2d 32, 42 (D.D.C. 2007) (noting that "the Supreme Court has refused to imply a private right of action in 'a bare criminal statute'").

B. FOIA Claims

As to the specific documents requested on pages 16-17 of plaintiff's complaint, there is no factual allegation that he properly submitted an initial FOIA request for those documents.[3] As a result, plaintiff has failed to exhaust his administrative remedies. Accordingly, Plaintiff's claim with respect to the documents specifically listed in his request for relief must also be dismissed. *See Pickering-George* v. *Registration Unit, DEA/DOJ*, 553 F. Supp. 2d 3, 5 (D.D.C. 2008) ("In the absence of any evidence that

2. To the extent that plaintiff is suing Secretary Gates in his personal capacity, plaintiff has alleged no facts that implicate any actions or decisions by Secretary Gates. Accordingly, plaintiff's complaint fails to state a claim against Secretary Gates upon which any relief can be granted.

3. Plaintiff requested relevant NSLs for the first time in his appeal of the NCIS disclosure but never made a proper initial request for those records. *(See* Connor Decl. [# 19-2] at ¶17). He remains free to do so.

plaintiff exhausted his administrative remedies by properly submitting a FOIA request to DEA, the Court concludes that defendant is entitled to judgment as a matter of law.").

To the extent that plaintiff's complaint states a claim with respect to his NCIS and INSCOM requests, for which defendants do not dispute exhaustion of remedies, defendants seek summary judgment on the ground that no information has been improperly withheld from plaintiff. I agree. The NCIS affidavit explaining in detail the agency's FOIA search describes a 46-page classified NCIS Report of Investigation concerning Plaintiff. (Connor Decl. [#19-2] at ¶8). Every page of the report has been released with the exception of: (1) a paragraph that was redacted in full by the Office of Personnel Management ("OPM"), (2) another paragraph that was redacted by SPA WAR, and (3) several redactions consisting primarily of third-party names, personal privacy information, and information concerning the capabilities of military equipment. *(Id.* at ¶¶8, 15, 19-23,2 8). As to those redactions, defendants assert exemption (j)(2) under the Privacy Act, 5 U.S.C. § 552a, and exemptions 2, 5, 6, and 7 under FOIA, 5 U.S.C. § 552(b). *(Id.* at 8-13). Plaintiff's administrative appeal of the paragraph redacted by OPM is still pending before that agency. (Def. Mot. to Dismiss [# 19] at 11 n.3).

With respect to the INSCOM request, defendants have submitted a separate affidavit stating that INSCOM located a total of 84 pages responsive to plaintiff's request. (Butterfield Decl. [#19-4] at ¶9). It

released 67 pages in their entirety, and the remaining pages were either withheld or redacted pursuant to exemptions (a)(4), (d)(1), and (j)(1) under the Privacy Act, 5 U.S.C. § 552a, and pursuant to exemptions 3 and 6 under FOIA, 5 U.S.C. § 552(b). *(Id.* at ¶¶9-10, 12-18).[4] Plaintiff is currently appealing those redactions to the Department of the Army Office of General Counsel *(Id.* at ¶19).

Even though agency review of plaintiff's administrative appeals is not complete, defendants invite this Court to pass judgment on the adequacy of their NCIS and INSCOM disclosures based on the detailed affidavits they have submitted.[5] After reviewing them carefully, the Court concludes that the defendants are entitled to summary judgment because plaintiff has wholly failed to adduce *any* evidence raising a genuine dispute as to defendant's compliance with FOIA. Indeed, the best plaintiff can muster are vague allegations that additional responsive documents exist or that defendants' claimed exemptions are fraudulent. This is

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4 Documents identified during the INSCOM search that were referred to the Defense Security Service ("DSS") were not processed as part of the INSCOM request because DSS determined that it had already provided that information pursuant to an earlier FOIA request made directly to DSS by plaintiff. (Declaration of Salvatore J. Demarco [# 19-5] at ¶8).

5 The exhaustion requirement is not jurisdictional "because the FOIA does not unequivocally make it so." *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003). Accordingly, where the agency consents, as defendants do here, there is no jurisdictional bar to judicial review.

not enough. It is well-established in our Circuit that a party "may not rely merely on allegations or denials" in opposing a motion for summary judgment. Fed. R. Civ. P. 56(e)(2). In this case, the plaintiff "has provided no factual basis for questioning the agency's declarations, which are otherwise accorded a presumption of good faith."[6] *Antonelli v. U.S. Parole Comm'n*, 619 F. Supp. 2d 1, 5 (D.D.C. 2009) (internal quotation marks omitted). Summary judgment based solely on agency affidavits is, of course, proper in FOIA cases so long as "the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). The Court is satisfied that defendants' affidavits meet this standard. Thus, defendants are entitled to summary judgment with respect to plaintiffs NCIS and INSCOM requests as well.

RICHARD J. LEON
United States District Judge

6 The Court must provide notice of summary judgment requirements to a pro se plaintiff only if "counsel for the defendants fail to provide [such] notice." *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992). Here, plaintiff was adequately apprised by defendants of his duty to submit affidavits or other documentary evidence challenging defendants' factual assertions. (*See* Def. Mot. to Dismiss [# 19] at 1 n.1).

APPENDIX C — DENIAL OF PETITION FOR REHEARING BY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED SEPTEMBER 1, 2010

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 09-5358

HAMDY ALEX ABOU-HUSSEIN,

Appellant

v.

Robert M. Gates, Secretary of Defense, et al.,

Appellees

ORDER

BEFORE: Rogers, Garland, and Brown, Circuit Judges

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk/LD